STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 12, 2005
v	No. 254239 St. Clair Circuit Court
DONNELL SHINHOLSTER-EL, Defendant-Appellant.	LC No. 01-002886-FH

Before: Donofrio, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from revised sentences imposed on resentencing. We affirm in part, reverse in part, and remand.

Defendant was convicted by a jury of manufacture of forty-five kilograms or more of marijuana, MCL 333.7401(2)(d)(i), conspiracy to manufacture forty-five kilograms or more of marijuana, MCL 333.7401(2)(d)(i) and MCL 750.157a, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court originally "sentenced defendant, as second-offender for a controlled substance offense, MCL 333.7413(2), and as a second habitual offender, MCL 769.10, to eighteen to thirty years' imprisonment for his manufacture of forty-five kilograms or more of marijuana, second offense, conviction, 36 to 270 months' imprisonment for his conspiracy to manufacture forty-five kilograms or more of marijuana conviction, and twenty-four to ninety months' imprisonment for his felon in possession of a firearm conviction, to run consecutively to two years' imprisonment for his felony-firearm conviction." *People v Shinsholster El*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2003 (Docket No. 242189).

In the previous appeal, we affirmed defendant's convictions but reversed only his sentence for manufacture of marijuana because the trial court, without articulating substantial and compelling reasons, deviated from the sentencing guidelines. On remand for resentencing, the trial court resentenced defendant to a guideline sentence of 38 to 360 months' imprisonment for manufacture of marijuana and made all of his sentences consecutive to each other. Defendant now appeals from his revised sentence.

Defendant first argues that the trial court erred when it made all of his sentences consecutive, and erred when it assigned jail credit for only his felony-firearm sentence. We

agree. A trial court may only impose a consecutive sentence if specifically authorized to do so by law, so our consideration of this issue involves statutory interpretation and is therefore reviewed de novo. *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003). However, the issue of jail credit is unpreserved, so defendant must show plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In defendant's first judgment of sentence, Counts II and III were concurrent. If a sentence is valid, the sentencing court may not modify it later. *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994). As noted, "[a] consecutive sentence may be imposed only if specifically authorized by statute." *People v Nantelle*, 215 Mich App 77, 79; 544 NW2d 667 (1996). Because the original judgment of sentence on Counts II and III was valid together with the fact that our order directing defendant to be resentenced was limited to Count I, the trial court was without authority to alter defendant's sentence on Counts II and III.

Defendant further argues that his felony firearm sentence should only be consecutive to Count I, the predicate felony. It is true that "the Legislature intended that a felony-firearm sentence be consecutive only to the sentence for a specific underlying felony." *People v Clark*, 463 Mich 459, 463; 619 NW2d 538 (2000). Although "it might appear obvious that the defendant also possessed a firearm while committing the other crimes of which he was convicted, neither a trial court nor an appellate court can supply its own findings with regard to the factual elements that have not been found by a jury." *Id*. at 464. Accordingly, only defendant's felony-firearm sentence should be consecutive to his manufacture of marijuana sentence.

The parties also place the applicability of MCL 333.7401(3) regarding whether defendant's remaining sentences were to be consecutive or concurrent at issue. We decline to discuss the retroactive effect of recent amendments[1] to MCL 333.7401(3) because defendant's sentences were pursuant to MCL 333.7401(2)(d)(i) and MCL 750.224f, which are not listed in either version of MCL 333.7401(3). *People v Hunter*, 202 Mich App 23, 25; 507 NW2d 768 (1993) (concluding that MCL 333.7401(3) is limited to the sections enumerated therein). Because none of defendant's other convictions are enumerated in MCL 333.7401(3), the section does not provide authority for consecutive sentences.

For the same reason, MCL 333.7401(3) is inapplicable to defendant's entitlement to jail credit under MCL 769.11b. However, "a defendant who has received a consecutive sentence is not entitled to credit against the subsequent sentence for time served. Rather, any credit for time served should be applied against the first sentence." *People v Watts*, 186 Mich App 686, 687; 464 NW2d 715 (1991). Because all sentences except for the manufacture of marijuana conviction should be concurrent, and because they must logically precede manufacture of marijuana, they are all "first sentences," and defendant is entitled to jail credit for all three. *People v Alexander*, 207 Mich App 227, 229; 523 NW2d 653 (1994). Denying defendant jail credit to which he is entitled deprives him of his liberty for longer than authorized and is therefore plain error. *People v Kimble*, 470 Mich 305, 313; 684 NW2d 669 (2004). Therefore,

[1] 2003 PA 665.

Counts II and III should be treated as if concurrent with Count IV instead of consecutive, and defendant is entitled to jail credit on all three counts. Count I, the predicate felony is served consecutive to Count IV, the felony-firearm conviction.

Defendant next alleges he must be resentenced because the trial court failed to consider a meaningfully updated presentence information report. However, defendant was offered the opportunity to make challenges to the report below and declined. Defendant argues this was forfeiture and not waiver. The record shows otherwise. Because defendant expressed his approval it is an intentional relinquishment of a known right. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Although a defendant may not waive a presentence investigation report at an initial sentencing, a defendant may do so at resentencing "[u]nless the prior report is manifestly outdated." *People v Hemphill*, 439 Mich 576, 579-582; 487 NW2d 152 (1992).

Even if defendant merely forfeited the issue, the question is not whether the trial court used an updated presentence report, but whether the report was "reasonably updated" at the time. *People v Triplett*, 407 Mich 510, 515-516; 287 NW2d 165 (1980). In *Triplett*, our Supreme Court found inadequate a report update that, in 1976, consisted of a "brief cover sheet" that "merely summarized the history of defendant's case since his 1971 plea-based conviction but added no further insight into defendant's conduct since 1972." *Id*. at 513. However, *Triplett* is distinguishable in several significant ways. First, the defendant objected to the trial court's reliance on an allegedly stale report. *Triplett*, *supra* at 512. Second, the report omitted known information about the defendant's subsequent prison conduct. *Id*. Third, the original report there was five years old. *Id*. at 512-513. In contrast, here, defendant did not object below and has not shown that any significant new information exists. This Court has found a one-page addition to a presentence report sufficient where there is no indication that the sentence was inappropriate and where the defendant failed to object. *People v Brzezinski*, 196 Mich App 253, 256-257; 492 NW2d 781 (1992). Furthermore, the original presentence investigation was twenty months old rather than five years, and there is no indication that the information was stale. Under these circumstances, we do not find plain error. *Carines*, *supra* at 763.

Finally defendant points out, and plaintiff agrees, that his amended judgment of sentence incorrectly lists his counsel of record at the time of resentencing. We agree that defendant has established an error requiring correction by this Court. On remand the judgment of sentence must be amended to show the correct attorney of record at the time of sentencing. *People v Avant*, 235 Mich App 499, 521; 597 NW2d 864 (1999).

We remand for administrative correction to amend defendant's judgment of sentence to award jail and prison credits to Counts II, III, and IV, and to provide that only Count I is consecutive to Count IV, and to correct his listed counsel of record. Affirmed in all other respects. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Stephen L. Borrello